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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NO. 87-1669

RICHARD L. DUGGER,

Petitioner,

v.

JAMES C. AGAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

WHETHER CERTIORARI SHOULD BE GRANTED WHEN THE LOWER COURT CORRECTLY APPLIED TOWNSEND V. SAIN, 372 U.S. 293 (1963), PROPERLY APPLIED THE RULES GOVERNING HABEAS CORPUS PROCEEDINGS UNDER SECTION 2254, AND ORDERED AN EVIDENTIARY HEARING, AND WHEN THE PETITION CONTAINED FACTS WHICH, IF TRUE, WARRANTED THE ISSUANCE OF THE WRIT.

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, James C. Agan, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 835 F.2d 1337 (11th Cir. 1987)(Fay, Vance and Anderson, JJ.).

OPINIONS BELOW

Before its decision in Agan v. Dugger, 835 F.2d 1337 (11th Cir. 1987), the Eleventh Circuit stayed Mr. Agan's execution, granted a certificate of probable cause to appeal, and issued an opinion. Agan v. Dugger, 828 F.2d 1496 (11th Cir. 1987). The State filed in this Court a Motion to Dissolve Stay of Execution and Certificate of Probable Cause, the motion was referred to the full Court, and the motion was denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In its petition, the State recited the fourteenth and tenth amendments as controlling. The tenth amendment was not argued below.[1] Mr. Agan agrees that the fourteenth amendment is involved, as are the sixth and eighth amendments. The sixth amendment provides in relevant part that:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense;

The eighth amendment provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. . . .

This case also involves section 921.141, Florida Statutes (1979), 28 U.S.C. section 2254,, and the Rules Governing Section 2254 Cases in the United States District Courts. Of particular importance is Rule 4, which provides, in pertinent part, for "summary dismissal," and Rule 8, which provides, in pertinent part, for "an evidentiary hearing."

STATEMENT OF THE CASE

This is a habeas corpus action by a Florida death-sentenced inmate. Summary dismissal by the district court was reversed by the Court of Appeals, and the matter was remanded for an evidentiary hearing. The opinions below detail Mr. Agan's grounds for relief, and why an evidentiary hearing is required:

> Of the numerous issues raised by Agan in his appeal to this court, we need only address Agan's claim that he is entitled to an evidentiary hearing with respect to ineffective assistance of counsel in reaching our conclusion that a certificate of probable cause must issue in this case. We note that no court, state or federal, has afforded Agan an evidentiary hearing on this matter.

---

1. At page 12 of the Petition to Rehear, the State cited the tenth amendment. It had not previously been mentioned during the course of the proceedings.

> Agan's proffer of evidence suggests that his trial attorney spent a total of only 15 hours working on the case. Those 15 hours include time the attorney spent for investigation, at the guilty plea hearing, and at the sentencing hearing. Agan claims that his attorney conducted little or no investigation either for the guilt or sentencing phase of his case. The proffer further suggests that any adequate investigation would have disclosed substantial exculpatory evidence, including the following: that Agan had a significant history of mental problems, had been diagnosed at one or more times as psychotic and as a paranoid schizophrenic, had been taking medicine for psychosis at times crucial to the facts of this case, and, in the recent opinion of one Dr. Fox, was incompetent to stand trial at the time of the plea and sentencing hearing; that one of the prison officials who investigated the murder had a question as to whether Agan was the killer; that one or more inmates had pointed to someone other than Agan as the killer; that one or more inmates had seen this other person leaving the area of the murder at about the crucial time. Furthermore, the proffer offers some evidence to suggest the possibility that Agan, for some reason -- perhaps attributable to his mental problems -- confessed, although innocent, and possibly was induced in this regard and coached by other inmates, possibly with the cooperation of prison officials.
>
> Both the state courts and the district court discounted the foregoing proffer, holding that Agan's plea of guilty and detailed confessions made by any such evidence irrelevant. That perspective overlooks the fact that the proffered evidence of mental problems is highly relevant to Agan's competence to stand trial and to the validity of the guilty plea itself. Moreover, all of the foregoing evidence would have been highly relevant at sentencing, even if the guilty plea itself were valid.
>
> We conclude that Agan has made a "'substantial showing of the denial of [a] federal right'" and that the issue is "'debatable among jurists of reason.'" Barefoot v. Estelle, 463 U.S. 880, 893 and n.4, 103 S.Ct. 3383, 3394 and n.4, 77 L.Ed.2d 1090 (1983) (citations omitted).

Agan v. Dugger, 828 F.2d at 1496-97 (emphasis added). After full briefing and argument, the lower court indeed did remand for an evidentiary hearing:

> In September of 1980, Florida State Prison officials found Dana DeWitt, an inmate

of the jail, dead in his jail cell. Following DeWitt's death, Agan, an inmate of the prison who was not a suspect in the case, confessed to the crime, re-confessed to a grand jury and to the sentencing judge, and waived all of his constitutional rights regarding this crime. He told the grand jury and the sentencing judge that he killed DeWitt because of a dispute that the two men had over money, that he had planned the murder for over two years, and that he regretted that DeWitt had not died a more painful death. He informed the grand jury and the sentencing judge that he was certain that, by confessing, he had almost guaranteed his receipt of a life sentence instead of a death sentence, and further announced that once he returned to prison, he would find and murder DeWitt's partner. Agan's self-proclaimed strategy did not work; the judge, relying on statutory aggravating factors and also noting Agan's lack of remorse, sentenced Agan to death.

We do not find it surprising that Agan's conduct failed to endear him to the sentencing judge. Indeed, Agan's behavior, at a minimum, is bizarre and misguided and raises serious questions about Agan's reasoning ability. We need not decide whether this in itself raises a real doubt regarding Agan's competence, however, because Agan had a history of mental problems dating back to his youth. In the 1940's and 1950's, the army discharged Agan three times; a 1945 report cites Agan's mental deficiency and his instability as the reasons for the first discharge. In 1953, Agan went to jail for robbery. Three prison psychiatrists concluded that Agan was psychotic. He therefore went to the state hospital where he received electric shock therapy. In 1974, after Agan's release from the hospital, a court in Tampa, Florida convicted Agan of murder. Between 1974 and 1980, the year Agan confessed to DeWitt's murder, Agan continued to suffer from mental health problems. He tried to hang himself in 1975; in 1978, he asked to be locked up because he felt that he was going crazy. Clinical reports outline Agan's hallucinations and diagnose him as a schizophrenic. He received medication to control his problems.

The State argues that none of this raises any serious questions regarding Agan's competence. The State claims that because the state hospital released Agan, he presumably has recovered from the psychosis from which he suffered at the time. The medication Agan received "controlled" his schizophrenia. Finally, the State asserts that Agan's army record is too remote in time to be considered. Therefore, the State urges us to affirm the district court's holding that "[p]etitioner has not presented clear

and convincing evidence to create a real, substantial, and legitimate doubt as to his mental competency to stand trial." Agan v. Dugger, No. 87-489-Civ-J-16 (M.D.Fla. filed June 24, 1987).

The State and the district court may in fact be correct that Agan was competent to stand trial. However, we cannot agree that Agan's evidence raises no serious doubts regarding his mental stability in 1980. The record on its face is inconclusive; but, Agan's allegations do raise an issue regarding competency. An evidentiary hearing is essential in order to resolve this issue. Since no hearing was held in the state courts, such must be completed in the federal district court.

. . . .

Two attorneys represented Agan during the pre-sentencing and sentencing period. First, John Stinson served as Agan's lawyer. Due to personal difficulties between Stinson and Agan, Stinson withdrew from this position. The court then appointed Mack Futch to represent Agan. Futch was Agan's attorney for both the plea and sentencing phases of the case.

The record indicates that neither attorney spent much time on Agan's case. Futch, who represented Agan at crucial phases of his case, apparently spent only 15.25 hours on the case. He never spoke with Stinson to familiarize himself with Agan's case; he did no legal research; and he interviewed only one witness in addition to Agan an the State attorney and investigator. Futch did not even attempt to develop any defenses that might have helped his client. Most significantly, neither attorney requested a competency hearing. Both attorneys had access to Agan's "inmate jacket," which contained Agan's medical record. Apparently, Futch actually examined this jacket. A review of Agan's long history of mental problems should have prompted Agan's attorneys to question Agan's competence. In addition, Agan's self-defeating behavior should also have alerted them to the possibility that Agan was incompetent to render his guilty plea.

Agan claims that ineffectiveness of counsel prejudiced his case. He argues that he is innocent and that he pled guilty due to his incompetence and to the fear of violence at the hands of the actual killer. If his lawyers had investigated, he contends, they would have realized this and been able to develop an adequate defense. Agan also asserts that his attorneys did not counsel him properly regarding his guilty plea. Although they both advised Agan not to plead

> guilty, neither fully explained the consequences to him. Had he understood the possible ramifications, he states, he would have behaved differently. Finally, Agan claims that he should have been declared incompetent. Then, he would have been unable to plead guilty and receive the death penalty.
>
> As the State correctly notes, there are many facts that could explain the conduct of Agan's lawyers. For example, Agan himself clearly wanted to plead guilty, and he apparently thwarted his attorneys' efforts to stop him. He may also have prevented them from preparing a defense. In addition, the lawyers may have made a strategic decision not to challenge Agan's competence, based on a reasonable determination that Agan was competent. None of this is clear from the record, however, and an evidentiary hearing will have to be held to answer these questions as well. Since no hearing was held in the state courts, such must be completed in the federal district court.

Agan v. Dugger, 835 F.2d at 1339-40 (emphasis added).

Since the State seeks review based upon a supposed conflict between this Court's opinions and the decision below, it is perhaps unimportant to note the misrepresentations made by the State with regard to the facts of the case. The misrepresentations are so rampant and so reckless, however, that a response is baited, and, if for accuracy's sake alone, some of the factual errors will be corrected. There is absolutely no support in the record for the State's assertion that Mr. Agan reduced a 1974 death penalty through a "competency" challenge and that this "plan" was used again in 1985 by a "confident" defendant. See Petition, pp. 4-5. Mr. Agan's testimony before the grand jury was "bizarre and misguided and raises serious questions about Agan's reasoning ability," Agan, 835 F.2d at 1339, as opposed to being "lucid and competent." See Petition, p. 5. Mr. Agan's Milledgeville Hospital records do not reflect that "doctors label[ed] his admission an 'error,'" Petition, p. 6, but show instead that one doctor believed that an earlier army discharge "with a diagnosis of paranoid schizophrenia" indicated "some error" based on "the history or records that I have. . . ."

App. 37. This doctor concluded only that "I would like to hear someone else's opinion on this." Id.[2] When Mr. Agan left Milledgeville, "he was recorded as restored," App. 38, not "fully restored," see Petition, p. 6, and there was no "sudden improve[ment] without medication," id. -- he was prescribed medication he refused to take, and he received extensive electroshock therapy.

Perhaps boldest of all is Petitioner's assertion that Florida State Prison records showed "no mental problems at all," Petition, p. 6, when, as the lower court wrote, the records were rife with such evidence, including suicide attempts, psychotropic medications, hallucinations, and self-imposed exile.

REASONS WHY THE PETITION SHOULD BE DENIED

A. THE DECISION BELOW CORRECTLY APPLIED THIS COURT'S PRECEDENT.

Since the passage of the Federal Habeas Corpus Act of 1867,[3] the federal courts have had the responsibility in criminal cases raising constitutional violations to "hear and determine the facts, and dispose of the matter as law and justice require." 28 U.S.C. section 2243 (para. 8) (1982); see Wingo v. Wedding, 418 U.S. 461, 468 (1974); Townsend v. Sain, 372 U.S. 293, 311 (1963). In Townsend v. Sain, this Court interpreted the statutory provisions to require the federal judiciary to resolve any factual dispute material to a claim, because "the opportunity for redress, which presupposes the opportunity to be heard, to argue and present evidence, must never be totally foreclosed." Id. at 312. More recently, both this Court in drafting, and Congress in approving the 1978 Rules Governing Section 2254 Cases reaffirmed

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2. Six months later, Mr. Agan was noted as having "psychotic episodes." App. 38.

3. Act of February 5, 1867, ch. 28, section 1, 14 Stat. 385-86.

the presumption in favor of evidentiary hearings. As the Advisory Committee Note to Habeas Rules 7 and 8 points out, "by far the majority" of habeas corpus petitions that cannot be disposed of summarily "raise . . . issues that necessitate an evidentiary hearing." This evidentiary hearing requirement is black letter law. See Wingo v. Wedding, 418 U.S. 461, 468 (1974)("since the Judiciary Act of February 5, 1967, . . . Congress has expressly vested plenary power in the federal courts 'for taking testimony and trying the facts anew in habeas hearing ...'"); Ford v. Wainwright, 477 U.S. ___, ___, 106 S. Ct. 2595, 2602-03, 91 L.Ed.2d 335, 347 (1986)(federal evidentiary hearing required on issue of capitally sentenced petitioner's sanity because no state court had heard and determined the issue); Cabana v. Bullock, ___ U.S. ___, ____ n.5, 106 S. Ct. 689, 698 n.5, 88 L.Ed.2d 704, 718 n.5 (1986); Vasquez v. Hillery, 474 U.S. 254, ___, 106 S. Ct. 617, 625, 88 L.Ed.2d 598, 611 (1986)(O'Connor, J., concurring)(evidentiary hearing necessary to give the petitioner a full and fair opportunity to litigate his fact-bound federal habeas corpus claim); Blackledge v. Allison, 431 U.S. 63, 83-84 (1977)(state prisoner is "entitled to careful consideration and plenary processing of his claim, including full opportunity for presentation of the relevant facts"); Machibroda v. United States, 368 U.S. 487, 495 (1962)("by the whole of the testimony, must it [sic] be determined whether the [federal habeas corpus] petitioner has carried his burden of proof and shown his right to a discharge"); Pennsylvania ex rel. Herman v. Claudy, 350 U.S. 116, 120-21 (1956)(where "allegations in the petition and the answer reveal a sharp dispute as to the facts material to a determination of the constitutional questions involved . . . [they] present the very kind of dispute which should only be decided after a hearing").

Conclusory allegations, or allegations that are "wholly incredible," Blackledge v. Allison, 431 U.S. at 74, will not

entitle a habeas corpus petitioner to an evidentiary hearing. However, an evidentiary hearing is required if there are factual disputes, and when "if true the allegations in his petition entitle [a petition] to relief." Id. at 70. This was the precise standard applied by the lower court, with regard to the competency and the ineffective assistance of counsel issues.

Citing Townsend v. Sain, the Court concluded that "Agan's allegations, if true, would warrant relief." Agan, 835 F.2d at 1340. The Court correctly noted that after an evidentiary hearing, "the State and the district court may in fact be correct," id. at 1339-40, and that Mr. Agan ultimately may not be entitled to the issuance of the writ. That, however, is an entirely different question from entitlement to an evidentiary hearing.

The State, with surprising vehemence, literally lashes the lower court for supposedly creating law and for frustrating the State through sheer whim. The State wrongly and unfairly accuses the lower court of "promulgat[ing] its own rules for granting automatic evidentiary hearings," Petition, at 9, of "rul[ing] by judicial fiat," id., and of ordering "frivolous hearing[s]." Petition, p. 11 n.1.[4] The State wrongly stated that the lower court "flatly agreed that the district court's findings were supported by the record," Petition, p. 12, when in fact all that was said was that the district court "may in fact [ultimately] be correct," but that the "record before us is completely inadequate." to tell. Agan, 835 F.2d at 1341. This Court's precedents were applied, and applied correctly.

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4. Such patently insulting, "burdensome, irrelevant, immaterial, and scandalous matter[s]" should be "stricken by the Court." Rule 34.6.

B. THERE IS NO CONFLICT BETWEEN THE LOWER COURT'S DECISION AND THE DECISIONS OF THIS COURT IN MARSHALL V. LONBERGER, ANDERSON V. BESSEMER CITY, BLACKLEDGE V. ALLISON, AND SMITH V. PHILLIPS.

The State argues that the lower court, upon review of summary denial of habeas relief, and in a case where no court has conducted an evidentiary hearing, was required to affirm the district court's denial unless there was clear error in findings of fact. The State argues that "[t]he Eleventh Circuit refused the State's request to apply the standard of review required by Marshall v. Lomberger, 459 U.S. 422 (1982), and Anderson v. Bessemer City, 470 U.S. 564 (1985),[5] which, according to the State, would have required that summary dismissal be affirmed.

These cases have nothing to do with the principles employed in determining whether to conduct an evidentiary hearing in a habeas corpus proceeding when none has been conducted. Mr. Agan's petition was summarily denied, as was his state post-conviction motion. No factual development occurred. The petition was denied "on the pleadings." Anderson v. Bessemer City deals with factfindings which occurred after the taking of proof in a Title VII action;[6] Marshall v. Lonberger deals with the 2254(d) presumption of correctness when a hearing on a claim

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5. The State's brief below never mentioned Marshall v. Lonberger, so the lower court hardly refused to consider it.

6. In Anderson, an evidentiary hearing was held in the district court to determine whether discriminating intent existed to support a Title VII action. The issue was what deference was due a "finding of the trier of fact," and Rule 52, Federal Rules of Civil Procedure, was the focus. 470 U.S. at 573. That Rule is in the "Trial" section of the rules, and it applies "[i]n all actions tried upon the facts without a jury . . . . . ." Rule 52, Florida Rules of Civil Procedure. There was no "trial" in district court in Mr. Agan's case.

has occurred in state court.[7] Presumptions of correctness after an evidentiary hearing, and the standard for review of error on appeal, after an evidentiary hearing, are not rules of law applicable to Mr. Agan's case.

Blackledge v. Allison does apply to this case, and the lower court's actions were consistent with Blackledge. "[A] prisoner in custody after pleading guilty, no less than one tried and convicted by a jury, is entitled to avail himself of the writ in challenging the constitutionality of his custody." Blackledge, 431 U.S. at 72. When allegations of incompetence, ineffective assistance of counsel, unknowing plea, etc., are supported by specific facts which are not "palpably incredible" or "patently frivolous or false," the petition may not be "summarily dismissed." Id. at 76. The decision below is in accordance with Blackledge.[8]

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7. In Lonberger, the petitioner had challenged in state court the use of a prior conviction to enhance punishment. The contention was that the first conviction was based upon an involuntary plea. In an out-of-jury evidentiary hearing in the later case, the petitioner "took the stand and submitted himself to direct and cross-examination, primarily as to his recollection of the [earlier] proceedings. . . ." 459 U.S. at 429. After this evidentiary hearing, the state trial court found the earlier plea to "have been voluntary, and admitted the prior conviction." This Court addressed the issue of whether 2254(d) required the Sixth Circuit to presume the state court's factfinding correct.

8. Mr. Agan cannot discern what Smith v. Phillips, 455 U.S. 940 (1982), has to do with this case, and cannot see how the lower court decision conflicts with it.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Mark C. Menser, Assistant Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, 111-29 North Magnolia Drive, Tallahassee, FL 32301, this 26th day of May, 1988.

_____
Attorney